

1 RICHARD SEGERBLOM, ESQ., Nevada Bar No. 1010
2 701 E. Bridger Ave., #520
3 Las Vegas, Nevada 89101
4 Telephone: (702) 388-9600
Facsimile: (702) 385-2909
Attorney for Plaintiff

5 **UNITED STATES DISTRICT COURT**

6 **DISTRICT OF NEVADA**

7 ELENA RODRIGUEZ-MALFAVON,

8 Plaintiff,

9 v.

10 CLARK COUNTY SCHOOL DISTRICT,
11 EDWARD GOLDMAN and ANITA
12 WILBUR

13 Defendants.

Case No.: 2:12-cv-01673-APG-PAL

14 **OPPOSITION TO RENEWED**
MOTION FOR SUMMARY
JUDGMENT
(ECF No. 125)

15 COMES NOW Plaintiff Elena Rodriguez-Malfavon, by and through her counsel of
record, Richard Segerblom and opposes the Defendants' Renewed Motion for Summary
16 Judgment (ECF No. 125) on the grounds that there are questions of fact surrounding her First
17 Amendment claim which cannot be resolved as a matter of law. This opposition is based on
18 the pleadings and papers on file, including Rodriguez-Malfavon's sworn declaration,
19 together with the attached memorandum of points and authorities.

20 DATED this 26th day of January, 2018.

21 */s/ Richard Segerblom, Esq.*

22 RICHARD SEGERBLOM, ESQ., Nevada Bar No. 1010
701 E. Bridger Ave., #520
23 Las Vegas, Nevada 89101
Telephone: (702) 388-9600
24 Facsimile: (702) 385-2909
Attorney for Plaintiff

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Elena Rodriguez-Malfavon (“Ms. Rodriguez”) is a First Amendment
4 protected whistleblower. In 2011, Ms. Rodriguez’s supervisor, Defendant Anita Wilbur,
5 gave Ms. Rodriguez an oral warning and negative evaluation after she blew the whistle on
6 Ms. Wilbur for secretly video and audio taping employees, students, and parents. As a result
7 of the negative evaluation, Ms. Rodriguez was demoted.

8 After the Ninth Circuit reversed this Court’s granting of summary judgment to
9 Defendants on Ms. Rodriguez’s First Amendment retaliation claim, Defendants now seek to
10 renew their motion for summary judgment, asserting that this Court and the Ninth Circuit did
11 not fully consider that claim. Although Ms. Rodriguez believes the renewed motion violates
12 this Court’s Discovery Order and has filed a motion to strike on that basis (ECF No. 127),
13 and although Ms. Rodriguez believes the issues identified by the Defendants were in fact
14 fully considered by this Court and the Ninth Circuit, she is submitting this limited opposition
15 to further clarify why Defendants have failed to establish they are entitled to summary
16 judgment on her First Amendment retaliation.

17 **II. RELEVANT PROCEDURAL HISTORY**

18 On September 22, 2012, Ms. Rodriguez filed suit against Defendants CCSD,
19 Edward Goldman, and Anita Wilbur, alleging national origin discrimination under Title VII,
20 retaliation under Title VII, discrimination and retaliation under 42 U.S.C. §§ 1981 and 1983,
21 and First Amendment retaliation under § 1983. (ECF No. 1.) On January 7, 2015, Defendants
22 moved for summary judgment on all of Ms. Rodriguez’s claims. (ECF No. 39.) Ms.
23 Rodriguez filed a Response on July 30, 2015. (ECF No. 46.) On December 7, 2015, this
24 Court entered an order granting in part and denying in part Defendants’ motion for summary
25 judgment. (ECF No. 50.) In that order, the Court granted summary judgment to Defendants
26 as to her claims for race discrimination, national origin discrimination, and First Amendment
27 retaliation, as well as one of her claims regarding Title VII discrimination. (*Id.*, p. 16:24-26.)
28 The Court denied summary judgment as to a second claim for Title VII retaliation. (*Id.*, pp.

1 16:26-17:2.)

2 Ms. Rodriguez proceeded to trial as to this remaining claim. (ECF Nos. 108, 109,
 3 and 110 (minutes of Jury Trial Days 1-3).) At the conclusion of trial, the jury found in favor
 4 of Defendants. (ECF No. 106 (jury verdict).) This Court entered judgment in favor of
 5 Defendants on October 11, 2016 (ECF No. 111); Ms. Rodriguez then entered a notice of
 6 appeal on November 10, 2016. (ECF No. 115.)

7 The sole claim presented in Ms. Rodriguez's appeal was that this Court erred in
 8 granting Defendants summary judgment as to her First Amendment retaliation claim. *See*
 9 *Rodriguez-Malfavon v. Clark Cty. Sch. Dist.*, 706 F. App'x 348 (9th Cir. 2017). Following
 10 oral argument, the Ninth Circuit entered a memorandum disposition reversing the district
 11 court's grant of summary judgment on the First Amendment retaliation claim, and remanded
 12 the matter to this Court. *Id.* at 349; *see also* ECF No. 123 (mandate of the Ninth Circuit)

13 **III. ARGUMENT**

14 **A. Goldman Was Intimately Involved in the Retaliation Against Ms. Rodriguez.**

15 In the renewed summary judgment motion, Defendant Goldman asserts there is no
 16 evidence he was tied to the retaliatory oral warning and unsatisfactory evaluation Ms.
 17 Rodriguez asserts were issued in retaliation for her First Amendment protected
 18 communications. (ECF. No. 125, p. 5:6-10.) This argument, however, is directly rebutted by
 19 emails which document how the oral warning and evaluation were created. (*See* ECF No. 46-
 20 5, Exhs. 15 and 16.)

21 Those emails show that Goldman, the Associate Superintendent of the Educational
 22 Services Division ("ESD"), was directly involved in the decision to issue the Oral Warning
 23 to Ms. Rodriguez. On May 24, ESD employee Juhasz wrote to Wilbur:

24 I'm working with Dr. Goldman on this. Per Dr. Goldman, please do not do
 25 ANYTHING further until I hear back from him. *He's going to review the*
 26 *document and then give me his final determination. We can't mail anything*
out or give her anything until we hear from him.

27 (Exh. 15, CCSD 316 (emphasis added).)

28 ///

1 This email indicates that, contrary to the arguments in Defendants' renewed
 2 summary judgment motion, Goldman was in fact involved in what Wilbur was doing to Ms.
 3 Rodriguez. When asked why he was involved in disciplining Ms. Rodriguez, Goldman stated
 4 he could not remember, thus allowing a jury to infer an improper motive. (ECF No. 46-7,
 5 Exh. 24, p. 12:21-24 (Goldman Deposition).)

6 Goldman confirmed in his deposition that he was aware that Wilbur received a
 7 Summary of Conference for audiotaping at the time he was involved in helping Wilbur create
 8 the Oral Warning which was given to Ms. Rodriguez:

9 Q. When you were involved in this process of giving the oral
 10 warning to [Ms. Rodriguez], were you aware that Ms. Wilbur had just
 11 received her own Summary of Conference and then had been ordered not to
 12 retaliate against anybody?

13 A. I'm sure I would have known at the time that Mrs. Wilbur
 14 received a disciplinary document, but No. 6^[1] was pretty much routine in
 15 any cases . . . *if the document is as a result of people, employees
 16 complaining. . . .*"

17 (*Id.*, pp. 16:20-17:8) (emphasis added).

18 If Goldman understood that Wilbur's Summary of Conference indicated that it
 19 resulted from an employee complaint, he cannot deny that Wilbur would have a motive to
 20 retaliate against the employee who complained—Ms. Rodriguez. Furthermore, Goldman
 21 admitted that he "would have known what Ms. Wilbur was being disciplined for and what
 22 she did or did not do and what Mrs. Rodriguez was being disciplined for." (*Id.*, p. 18:1-3.)

23 This evidence indicates that, at a minimum, Goldman ratified Wilbur's efforts to
 24 retaliate against Ms. Rodriguez's whistleblowing, and may have even instigated it. As noted
 25 above, Goldman was the Associate Superintendent of the ESD. Goldman did not supervise
 26 Wilbur; rather, Wilbur was supervised by Isaac Stein, who was in turn supervised by Brad
 27 Waldron. Thus, there is a genuine question of fact regarding the extent to which Goldman
 28 was involved in Ms. Rodriguez's discipline.

¹ Referencing item #6 on Wilbur's Summary of Conference which stated "Do not . . . take any retaliatory action against any employee." (ECF No. 46-4, Exh. 14.)

1 Other evidence previously submitted to this Court documents Goldman's
 2 involvement in the retaliatory discipline Ms. Rodriguez received. Specifically, evidence Ms.
 3 Rodriguez submitted with her opposition to Defendants' original motion for summary
 4 judgment show that Goldman participated in the creation of the unsatisfactory evaluation
 5 based upon the oral warning. On May 31, 2011 Juhasz wrote that "we'll have Eddie
 6 [Goldman] do a final" draft of the unsatisfactory evaluation. (ECF No. 46-6, Exh. 18, Bates
 7 CCSD 268.) And on June 3 Juhasz writes, "*The evaluation is approved by Dr. Goldman for*
 8 *issuing.*" (*Id.* at Bates CCSD 2163 (emphasis added)). How much more involved could he
 9 be?

10 Furthermore, Goldman has a history of retaliating against CCSD employees who
 11 exercise their First Amendment rights and of ratifying the retaliatory acts of other CCSD
 12 administrators. For example, in *Lytle v. Carl*, 382 F.3d 978 (9th Cir. 2004), the Ninth Circuit
 13 upheld a First Amendment jury verdict against CCSD in a case where Goldman had reviewed
 14 all discipline and documents and had collaborated on the conferences and directives that the
 15 teacher alleged were retaliatory, concluding that "[t]he jury could reasonably infer from this
 16 evidence that Goldman actively participated in the discipline of Lytle and ratified the
 17 decisions of his subordinates." *Id.* at 988 (emphasis added). This case is yet another example
 18 of Goldman "reviewing" and "ratifying" discipline which resulted when an employee
 19 engaged in First Amendment protected activity.

20 **B. Defendants Goldman and Wilbur Are Not Entitled to Qualified Immunity.**

21 As Goldman and Wilbur indicate in the renewed summary judgment motion, local
 22 government officials are entitled to qualified immunity unless their conduct violates clearly
 23 established federal or constitutional rights. (ECF No. 125, p. 5:21-24) (citing *Brewster v.*
 24 *Board of Education of the Lynwood Unified School Dist.*, 149 F.3d 971; 977 (9th Cir. 1998)).
 25 In the First Amendment context, the Court should look to the balancing test of whether the
 26 employee's speech was constitutionally protected. *Brewster*, 149 F.3d at 979-80.

27 ///

28 ///

1 In this case, the Court must weigh Ms. Rodriguez's right to bring a potential
 2 criminal and civil matter—the audio taping of employees, students and/or parents—to the
 3 attention of her principal's supervisor against CCSD's need to maintain order. The
 4 Defendants have not produced any evidence that Ms. Rodriguez's complaints disrupted the
 5 workplace or caused any problems for the District. Thus, the Pickering balancing test clearly
 6 weighs in Ms. Rodriguez's favor. This was not a mere disgruntled employee voicing an
 7 internal work-related complaint. If Ms. Rodriguez's allegations were true CCSD faced huge
 8 potential problems if the audio taping was confirmed and known by employees, students and
 9 parents.

10 Additionally, the question is not whether the conduct violated a general principle
 11 of law, but ““whether the violative nature of the particular conduct is clearly established’ by
 12 controlling precedent. . . .” *Sharp v. County of Orange*, 871 F.3d 901 (9th Cir. 2017), quoting
 13 *Mullenix v. Luna*, 136 S.Ct. 305, 308 (2015). Thus, if there is Supreme Court or Ninth
 14 Circuit precedent involving similar whistleblowing the individual Defendants are not entitled
 15 to qualified immunity.

16 In *Burgess v. Pierce County*, 918 F.2d 104 (9th Cir. 1990), the plaintiff/employee
 17 alleged that he had been fired in retaliation for communicating with other county officials,
 18 with the County Council and with members of the public, in opposition to passage and
 19 enforcement of ordinances he believed conflicted with state standards which exposed the
 20 county to potential tort liability. The Ninth Circuit held that “discharging a public employee
 21 in retaliation for protected speech violated clearly established law of which a reasonable
 22 person would have known.” *Id.* at 106.

23 These facts are similar to the facts in Ms. Rodriguez's case. If they proved a
 24 violation of clearly established law in 1990 it is tough to argue that Wilbur and Goldman did
 25 not know they were violating the law in 2011, over 20 years later. Accordingly, they are not
 26 entitled to qualified immunity.

27 ///

28 ///

1 **IV. CONCLUSION**

2 As the argument above demonstrates, the Ninth Circuit was correct in remanding
3 this case for a trial on the merits. Ms. Rodriguez is a whistleblower who was retaliated
4 against because she complained that her supervisor was engaging in illegal and unethical
5 conduct.

6 DATED this 26th day of January, 2018.

7
8 /s/ Richard Segerblom, Esq.

9 RICHARD SEGERBLOM, ESQ., Nevada Bar No. 1010
10 701 E. Bridger Ave., #520
11 Las Vegas, Nevada 89101
12 Telephone: (702) 388-9600
13 Facsimile: (702) 385-2909

14 *Attorney for Plaintiff*

15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on this 26th day of January, 2018, I did serve, via Case
3 Management/Electronic Case Filing, a copy of the above and foregoing OPPOSITION TO
4 RENEWED MOTION FOR SUMMARY JUDGMENT (ECF No. 125) addressed to:

5 Ethan D. Thomas
6 LITTLER MENDELSON, P.C.
7 3960 Howard Hughes Parkway, Suite 300
8 Las Vegas, Nevada 89169
9 *Attorneys for Defendant*

10 _____
11 /s/ *Richard Segerblom, Esq.*
12 RICHARD SEGERBLOM, ESQ.